TESTIMONY OF L.JOHN LUFKINS
President of the Executive Council
before the
COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE
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S. 2986

Mr. Chairman, and members of the Committee, I am pleased to be invited to present testimony on behalf of the Bay Mills Indian Community on Senate Bill 2986. I speak here today in my official capacity as President of the Executive Council, which is the elected government of the Tribe. The legislation before you is extremely important to my people; its importance will be better understood by my description of the history of the Tribe and the origin of this controversy.

The Bay Mills Indian Community is comprised of the bands of Sault Ste. Marie area Chippewa who signed treaties with the United States beginning in 1795. Its modern-day Reservation is located at the juncture of the St. Mary's River and Lake Superior, in the Iroquois Point area of Michigan's Upper Peninsula, and on Sugar Island, which is just east of Sault Ste. Marie, Michigan, in the St. Mary's River Channel. The Tribe is one of four in Michigan which has maintained government to government relations with the United States since treaty times. It adopted a Constitution in 1936 under the Indian Reorganization Act, and established as its form of government the traditional Chippewa public forum, in which all adult members comprise the General Tribal Council. When in session, the General Tribal Council adopts the laws of the Tribe. I represent a direct democracy, which votes every two years to select officers, known as the Executive Council. Total enrollment is approximately 1,500 members. It is on their behalf that I speak today.

I am also very proud to testify on this legislation, as it represents the final step in obtaining redress of a great wrong done to ancestral bands of the Bay Mills Indian Community over 100 years ago. My Tribe is deeply grateful to Senator Stabenow for sponsoring the bill, and to Congressmen David Bonior and Don Young for sponsoring the companion bill in the House. I also wish to acknowledge the assistance and support that our Congressman, Bart Stupak has given to the Tribe in its efforts to achieve redress.

As do many issues involving Indian tribes, this one was generated in a treaty with the United States, signed in Detroit, Michigan, on July 31, 1855. Article 1 of that treaty required the United States to withdraw from sale certain public lands for selection by the Indian band signatories. The first clause sets aside certain lands for the "six [Chippewa] bands residing at or near Sault Ste. Marie"; those bands are our ancestors. Among the lands set aside was the property now known as Charlotte Beach. At that time, it was called the Hay Lake Reserve.

One week before the land was withdrawn from public sale, the Charlotte Beach property was purchased by two non-Indians, Boziel Paul and Joseph Kemp on August 1, 1855. Although complaints were made to the resident Indian agent, the sale was not rescinded. In order to recover those lands, annuities received under the 1855 treaty were pooled and the Charlotte Beach lands were purchased from Boziel Paul and his wife on October 12, 1857. This acreage was the only portion of the Hay Lake Reserve that was not marshland; the remaining portion of the Reserve was determined by the Michigan Agency Superintendent to be unfit for allotment.

No longer confidant that the United States would protect their land from loss, the chiefs insisted that title to this property be conveyed to the Governor of the State of Michigan, and his successors in office, in trust for the two bands of which Shawan and Oshawa-no were chiefs. The deed was recorded in the Chippewa County, Michigan, Register of Deeds office on that same date. The property was placed on the tax rolls in 1866, and was sold in the 1880's for unpaid taxes. With the assistance of the Michigan Agency of the Bureau of Indian Affairs and at the express invitation of the three bands already there, band members relocated to the Iroquois Point reserve on Whitefish Bay of Lake Superior--which still comprises a portion of the Bay Mills Indian Community Reservation. (Members of the sixth band primarily reside on the Garden River Reserve in Ontario, Canada.)

Equally a part of my Community's history is the other reason why the bands consolidated in the Iroquois Point reserve--the loss of the fishing encampment ground at the St. Mary's Rapids in Sault Ste. Marie in 1853. The reserve had been created by an 1820 treaty, when lands were ceded to the United States to build Fort Brady. The reserve stood in the way of progress, apparently, for the engineers hired to build the first lock at the Soo determined it should go right through the reserve. The people there were thrown out of their homes by the U.S. Army, and their homes burned to the ground. Many fled to Iroquois Point. By the time the treaty giving up the reserve was signed on August 1, 1855, the encampment ground reserve was under water. The Iroquois Point Reserve received its first refugees before then.

You should be able to understand the disbelief of the Hay Lake Reserve refugees, that the State was no more able to protect their land than had the United States. Both of these stories are part of my Community's history.

My ancestors may have had to swallow the loss of the encampment grounds by signing a subsequent treaty with the United States. Twenty years later, they were less willing to resign themselves to accepting loss of their lands.

Complaints were made to the United States, but no effort was made by Indian agents to recover the land. Letters were sent to the Governor, but no response was ever received. Over the next 90 years, my people did not forget this wrong, but had no idea how to make it right. Whatever resources we had were used to ensure our physical survival, and to protect what lands remained to us.

Our efforts focused on asserting outstanding claims against the United States, resulting in Indian Claims Commission money damages judgments in Dockets 18-E and 58, and 18-R; legislation providing for distribution of those funds did not get enacted until 1997 in Pub. L. 105-143--and then only after Bay Mills sued the Secretary of the Interior in 1996 to compel the development of a distribution plan.

Our other main focus was to protect our rights to fish in the waters of the Great Lakes ceded in our treaty with the United States on March 28, 1836. The United States brought suit on our behalf in 1972 against the State of Michigan, and we pursued our rights in the Michigan court system. Vindication came from the Michigan Supreme Court in 1976 in People v. LeBlanc. The federal case is known as United States v. Michigan, and following the 1979 decision upholding the rights, the United States, the State and the plaintiff tribes successfully negotiated two (2) allocation agreements; the most recent agreement was reached in August, 2000. Both have received federal funds through the appropriation process, and Congress has also provided the financial support for the tribal management of the treaty fishery since 1981.

Through these battles, the Hay Lake land claim was not forgotten by the people. We thought we would finally obtain justice in 1980, when the claim was filed with the Bureau of Indian Affairs under the so-called 2415 process. As you may remember, Congress sought to identify and correct infringements on Indian land which occurred prior to 1966, by directing the filing of trespass claims against third parties under 28 U.S.C. sec. 2415. The claim was filed in the Federal Register in 1983, but the United States ultimately declined to pursue the Charlotte Beach claim, on the technical ground that the lost land was not in trust with the federal government, but with the state. According to the Department of Interior Field Solicitor, there was no obligation for the United States to seek damages on behalf of the Tribe when it was not the trustee. Efforts to reverse this decision went nowhere.

As it was clear that the United States would, or could, do nothing, the task of finding a solution remained the Tribe's to carry out. It became imperative to do so, as title insurance companies began to identify the land claim as an exception to the policies issued to property in Charlotte Beach. A lawsuit was finally filed against approximately 140 landowners in the federal court in 1996; simultaneously, a separate suit was filed in the State Court of Claims against the State of Michigan and other state entities.

The federal case was ultimately dismissed in 2000. Yet again, technical grounds were the reason. Before that, terms for settlement were negotiated with attorneys for the landowners, under which a fund was created from contributions from the settling defendants; the contribution amount was an agreed-upon portion of the value of the property owned by each. This method of settlement was preferred by the Tribe, as it had no desire to force people from their homes, and thereby subject innocents to the same type of wrong and hardship as my ancestors endured. Any chance of carrying out the settlement ended with the litigation. To this day, the cloud remains on their title.

The basis for the dismissal of this case was not that the Tribe had a baseless claim against the Charlotte Beach land; we never were given the chance to present it. The case was dismissed because the landowner defendants thought another Indian tribe might have a claim to the land, as well. That Tribe is the Sault Ste. Marie Tribe of Chippewa Indians, which was recognized by the Department of the Interior in 1973. That Tribe never tried to participate in the case, and its lawyer told the judge at a hearing that the Sault Tribe would not waive its sovereign immunity to be named as an additional plaintiff. Its participation in the case was limited to assisting lawyers for the landowners in their fight to have the case dismissed for failure to join an indispensable party. They were successful, and as I have said before, the cloud remains on the landowners' title. To this day, the Sault Tribe has not asserted any claim to the property in any court.

Technical grounds also defeated the Bay Mills case in State court. It was dismissed for failure to bring the case within the Michigan statute of limitations. The Michigan Supreme Court and the United States Supreme Court refused to hear our appeal earlier this year. However, the cloud still remains on title to the Charlotte Beach land.

It is with this frustrating history in mind that I ask you to carefully consider S. 2986. The legislation approves, ratifies and implements the Land Settlement agreement between the Bay Mills Indian Community and the Governor of the State of Michigan. The terms of the Settlement were negotiated earlier this year, and deserve my detailed discussion.

* The Settlement releases the claims of the Bay Mills Indian Community to the Charlotte Beach property, subject to the approval of Congress to the extinguishment of the claims.

* The Settlement provides the Tribe with alternate property, which substitutes for the Hay Lake Reserve. That Reserve was promised to the Tribe's ancestors in solemn treaty in 1855, and it is long past time that the promise is kept. I also like to think that this alternate land finally implements the trust that my ancestors tried to confer on the Governor in 1857.

* The alternate land is to be placed in trust with the Secretary of the Interior for the benefit of the Bay Mills Indian Community, thereby acknowledging its substitution for lands which should have been in trust for the Tribe all along.

* The alternate land is in Port Huron, Michigan. This location was agreed upon by the Tribe and the Governor, because it provides significant economic advantages to the area and to the Tribe, and is supported by popular vote of the people of Port Huron. This determination is entitled to deference by federal policy- makers.

* The Settlement requires the Tribe to limit its gaming facilities to two (2) in Chippewa County and the alternate land location. In the absence of the Settlement, the Tribe may operate as many Class III gaming facilities as it chooses.

* The Settlement requires the Tribe to provide a proportion of its electronic gaming revenue to the State. The Tribe had agreed to do so under a Consent Decree entered in federal court in 1993, but that obligation ended under its own terms in 1997. The Settlement thus reinstates the prior status quo.

* The Settlement expressly upholds the terms of the Tribal-State Gaming Compact executed on August 20, 1993, and published as approved in the Federal Register on November 30, 1993. The State agrees not to seek renegotiation of its terms until 2032. The parties thereby maintain stability in the conduct of gaming by the Tribe for a significant period of time--which is a major goal of both tribal and state governments.

* The Settlement enables the Tribe to establish long-term goals and objectives to provide employment opportunities for its members, diversify its economic base, expand its governmental services in the areas of health, environmental stewardship, adequate housing, and education. Without the Settlement, member reliance on the treaty fishery for income will continue to require periodic, and contentious, allocation disputes with state- licensed fishers and the members of other treaty tribes.

* The Settlement and S. 2986 do not affect the rights of any other Tribe--in Michigan or elsewhere-- whether to land, resources, or economic opportunities. If any other land claim exists, the claimant Tribe is free to pursue it. To any concern about additional competition, I must point out that no Indian tribe has a right under federal law or policy to be guaranteed a particular market share of available customers. Under the free enterprise system, competition generates innovation and creation of a better product.

* The Settlement and S. 2986 implement an express exemption to the prohibition in the Indian Gaming Regulatory Act of gaming on lands acquired after October 17, 1988. That exemption is for lands obtained in settlement of a land claim. Nothing in the legislative history of the Act, or its implementation by the Bureau of Indian Affairs and/or the National Indian Gaming Commission, establish criteria which this Settlement violates. Bay Mills is the first Indian tribe to secure a settlement of its land claim since the Act was adopted, and therefore the first to fall within the exception's terms.

Credit for this creative and advantageous resolution of the Bay Mills Land Claim must go to Governor John Engler of Michigan. Although it was not easy, the Land Claim Settlement was achieved through the mutual recognition of the importance of working cooperatively and respectfully to eliminate old grievances and to develop mutually beneficial solutions. As a further benefit, the State and Tribe have created a process by which other, and equally important and difficult, issues can be identified and addressed through negotiation.

I am very proud to say that I signed the Land Claim Settlement on behalf of the Bay Mills Indian Community. I am not boasting when I say that this agreement should be applauded by the federal government--in all three of its branches--as exhibit number one of what can be achieved when a state and Indian tribe decide to "bury the hatchet" and devise outcomes to disputes which benefit the citizens of the State, the members of the Tribe, and their representative governments.

I hope that the Land Claim Settlement is precedent for other Indian tribes and states to bring their disagreements to the table. I think that they will find that they can achieve more in that manner than fighting in the courts or in the halls of Congress. But all the efforts of my Tribe and the State negotiators will be for nothing if Congress does not exercise its plenary power and approve the Settlement by enacting S. 2986. As the duly elected spokesman for my people, I ask each member of the Committee to vote favorably on this bill. I ask each member to end this controversy, which has brought pain to my people and uncertainty to the people who have taken their place at Charlotte Beach. I ask each member to right a wrong that was done before any of us were born, but still lives on today. My people have waited patiently and with confidence that this wrong would be made right. Do not make their wait in vain.